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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 544

BORO HALL CORP.,

Plaintiff-Petitioner,

against

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION, WILLIAM E. HOLLER, ALFRED P. SLOAN, JR., WILLIAM S. KNUDSEN, DONALDSON BROWN, and JOHN THOMAS SMITH,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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HARRY J. MCDERMOTT,
Of Counsel.

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GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION, WILLIAM E. HOLLER, ALFRED P. SLOAN, JR., WILLIAM S. KNUDSEN, DONALDSON BROWN, and JOHN THOMAS SMITH,

Defendants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, BORO HALL CORP., respectfully represents:

Summary Statement of Matter Involved

This case presents the question whether on a motion to dismiss an action because the complaint fails "to state a claim upon which relief can be granted" under Rule 12(b) (6) of the Rules of Civil Procedure (28 U. S. C. A. foll. Sec. 723(c); printed in Appendix to Brief), the sufficiency of the claim is to be tested by the allegations

of the complaint (following the practice upon demurrer and that under Equity Rule 29—*Polk Company* v. *Glover*, 305 U. S. 5, 9), or whether there may now be taken into account factual matter going beyond the complaint, presented by a defendant in affidavits. There is a wide difference of opinion on this subject, the decisions of the Circuit Courts of Appeals are in conflict, and the subject has not been considered in any reported decision of this Court.

Corollary questions are: (a) Does the complaint on its face state a cause of action for treble damages under the Anti-Trust Acts (15 U. S. C. A., Sec. 1 et seq.; printed in Appendix to Brief); and (b) if consideration of respondents' affidavit was permissible, did the Court err in determining that the restraint complained of was reasonable.*

Petitioner instituted the action to recover treble damages under the Sherman and Clayton Anti-Trust Acts (15 U. S. C. A., Sec. 1, et seq.). Respondents filed no answer, but moved for an order dismissing the action "because the complaint fails to state a claim, in law or in fact, upon which relief can be granted against the defendants or any of them" (R. 16). The notice of motion is worded in the language of Rule 12(b) (6) of the Rules of Civil Procedure. No demand was made for summary judgment under Rule 56. However, the respondents annexed an affidavit and exhibits to their motion papers and stated that they were moving thereon as well as on the complaint (R. 16). Judge Conger in the District Court was doubtful whether the affidavit could be considered (R. 126, 37 Fed. Supp. 1000) and said:

> "The point has been raised and argued that, in considering this motion, the court is limited to the complaint and may not consider the affidavits and ex-

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* This petition is addressed solely to the dismissal of the first cause of action, and no review is sought as to the second cause of action.

> hibits that have been submitted. I am aware that a controversy has existed as to this from the very inception of Rule 12(b), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. Because it is not necessary to the determination here I shall not pass upon the question, but shall limit myself to the complaint."

However, in dismissing the complaint, he took into consideration the contract which had been annexed to the defendants' affidavit, saying:

> "I will consider, however, the 'selling franchise' or 'agreement', which is attached to defendants' papers because, except for a disagreement as to whether it is one or the other of the above, its terms are apparently not in dispute, and because it is revealing as to the true relationship that existed between the parties."

In the Circuit Court of Appeals, Judge Augustus N. Hand, writing for the majority, said (R. 142; 124 F. 2d 822, at 823):

> "We see no reason why the application should not be treated as one for summary judgment under Section 56 of the Rules of Civil Procedure. But even if the motion were regarded as made under Section 12(b) of the rules, we have held that affidavits might be employed. *Central Mexico Light & Power Co.* v. *Munch,* 116 F. (2d) 85, 87. See also *Gallup* v. *Caldwell,* 120 F. (2d) 90, 92 (C. C. A. 3)."

The District Court dismissed the complaint without leave to amend. The opinion is reported in 37 F. Supp. 999 and appears at pages 124-129 of the Record. An order of dismissal was entered on April 4, 1941 (R. 130-132) and judgment was entered thereon April 15, 1941 (R. 132, 133). On appeal the Circuit Court of Appeals for the Second Circuit (R. 134-135) the judgment was affirmed by a divided Court (R. 303). The opinion of the majority of the Court appears at pages 142-144 of the

Record and that of Judge Frank dissenting at page 145 of the Record. These opinions are reported in 124 F. 2d 822. Thereafter, petitioner applied for rehearing (R. 146-153) which was denied by the Court (R. 302-303). The opinion on the petition for rehearing appears at pages 301 and 302 of the Record and is reported in 130 F. 2d 196. The order of affirmance was entered August 26, 1942 (R. 303).

The holding of the District Court was that the complaint was defective in that its allegations did not demonstrate any restraint on interstate commerce and that it failed to set forth such a restraint as would, in any event, constitute a violation of the Anti-Trust Laws (R. 127).

The majority of the Circuit Court of Appeals in affirming the judgment on the first cause of action, predicated its decision upon the view that the proof disclosed no unreasonable interference with competition (R. 143). Concerning this cause of action, they made no reference to a lack of allegation of interstate commerce. In affirming the second cause of action, the majority stated specifically that the acts were plainly intrastate and did not affect interstate commerce (R. 144).

Judge Frank, in dissenting, expressed the opinion that the question was one which should be determined at a trial. His view is that the case should be reversed in order to permit petitioner to amend by inserting more explicit allegations as to the burden on interstate commerce if that were necessary (R. 145).

The Complaint

Petitioner had for many years been engaged in the business of buying and selling both new and used automobiles in Brooklyn, New York City (R. 7, 8). The respondent General Motors Corporation was a manufacturer of auto-

mobiles which it sold through its wholly-owned subsidiary, the respondent General Motors Sales Corporation (R. 6).

The Sales Corporation's method of selling automobiles was through franchise agreements with dealers, in some of which General Motors had a financial interest (R. 6, 7, 8). Reference is made particularly in this connection to an investment by General Motors in the Hetzer Chevrolet Sales Co. Inc. located in Brooklyn (R. 8).

The individual respondents, other than Holler, were officers of General Motors Corporation, and the respondent Holler was General Manager of the Chevrolet Motors Division of the Sales Corporation. These individual respondents were also members of a Dealer Relations Board, to which reference will be made later (R. 4-6).

In the latter part of the year 1933, and thereafter until September 1, 1940,* petitioner operated under a franchise from the corporate respondents whereby it was allotted for the sale of new Chevrolet automobiles a "non-exclusive selling franchise in the territory known as the New York Zone" (R. 7), an area including the entire State of New York and a portion of the State of New Jersey (R. 7).

In addition to selling these new Chevrolet cars, petitioner dealt in used cars not acquired from the respondents. They were cars which petitioner had accepted in trade and for which it had granted allowances to purchasers of new cars and of other used cars (R. 8). Some of them were not even of the type manufactured by General Motors.

Although the petitioner's franchise was for the New York Zone, the respondents arbitrarily demarcated for the petitioner a more limited area in the downtown section of Brooklyn which it called a "Zone of Influence" (R. 8-9).

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* During that period its corporate name was Boro Hall Chevrolet, Inc. (R. 6, fol. 18).

The gravaman of petitioner's complaint is that respondents refused to permit it to open a used car outlet (salesroom or lot) outside of this limited "Zone of Influence."

This restraint is alleged to have been part of a plan whereby the respondents restrained trade in used cars, not only of the petitioner, but of other General Motors dealers who were likewise required to confine the location of their used car outlets to their respective Zones of Influence. This, it is alleged (R. 9, fol. 26), favored the dealers in which the corporate respondents had financial investments.

Petitioner says that obedience to this scheme was enforced by the respondents in various fashions. Written contracts were made for the term of one year with the reservation of the right to cancel without cause; the contracts required dealers to sell a certain number of cars, but the right was reserved to the corporate respondents to refrain without cause from delivering cars. Recalcitrant dealers were threatened with cancellation of their franchise agreements or with a refusal to furnish cars (R. 9).

The respondent Sales Corporation refused to permit the petitioner to establish a used car outlet outside its Zone of Influence, whereupon an appeal was taken to the respondent Holler, who refused to grant permission to open an outlet except with the approval of a Regional Manager (R. 9-10). An appeal was then taken to the Dealer Relations Board of General Motors Corporation consisting of the respondents Sloan, Knudsen, Brown and Smith, and their decision was that a location for a used car outlet should not be "unduly prejudicial" to the interests of other dealers (R. 10-11).

The complaint alleges (R. 11):

> "34. That by reason of the conspiracy of the defendants and each of them to restrain trade in used cars, the plaintiff has been demaged in that it was unable to liquidate its used cars; that its inability to

liquidate its used cars prevented it from buying new Chevrolet automobiles and made it impossible for it to accept orders for new automobiles which it might otherwise have obtained; that its investments in buildings, alterations, leases and equipment were depreciated in value; and that it was injured in its business and property."

Damages are asked in the sum of $250,000.00.

Respondents' Affidavit

The affidavit submitted on behalf of the respondents is devoted mainly to a recitation of the exhibits annexed thereto. It states that petitioner terminated the selling agreement effective September 1, 1940, and that this was accepted by General Motors (R. 21; Exh. 9, R. 88; Exh. 10, R. 89).

An announcement of the creation of the Dealer Relations Board in January, 1938 (Exh. 1, R. 24-34), a document prescribing the procedure before this Board (Exh. 2, R. 35-44), and a specimen contract between General Motors and the petitioner (Exh. 3, R. 44-82) are likewise attached to the affidavit. None of these documents referred to "Zones of Influence" or to limitations of outlets for the sale of used cars. They make no provision regulating sales of used cars.

The Zone of Influence is shown on a map (Exh. 7, R. 85) and there are letters addressed to Chevrolet Motor Division by the petitioner which relate mainly to a complaint about the location of other dealers' sales rooms near its place of business (Exhs. 11, 13 to 15, R. 89-101). However, one of the letters does state that the petitioner was stopped from establishing used car lots outside of its territory (R. 98).

Another exhibit is the decision of the respondent Holler which refers to the complaint concerning the opening of

sales rooms by other dealers, and which, in connection with Holler's decision about the used car outlet, states the following (Exh. 19, R. 109):

> "It was further the decision of the Committee that you may, with the approval of Mr. K. M. Chase, Regional Manager, establish a Used Car outlet outside of your present Zone of Influence, which will enable you to sell used cars in greater volume."

Exhibit 26 (R. 117-119) is the letter of the respondent Sloan containing the conclusion reached by the Dealer Relations Board. Relative to the location of used car outlets, this letter says (R. 118):

> "Likewise, you feel that you should have greater flexibility in the location of used car lots outside your so-called sphere of influence.* * *"

And at page 119:

> "With reference to the used car lot to be located outside of your zone of influence, the Board understands that that has been approved, in principle, by Chevrolet, and we feel that that should be a part of the decision, with the understanding, of course, that a location should be agreed upon that meets your viewpoint, and at the same time is not unduly prejudicial to the interests of the other dealers."

Reasons Relied on for the Allowance of the Writ

The Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be, settled by this Court.

(a) In its interpretation of Rule 12 (b) (6), the Circuit Court of Appeals has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals on the same matter. Contrary views were expressed in:

> *Cohen* v. *United States* (C. C. A. 8th, August, 1942), 129 F. 2d 733, 735 et seq.;

Continental Collieries v. *Shober* (C. C. A. 3d, Sept. 1942), 130 F. 2d, 631, 635-636, points 16-17.

Gallup v. *Caldwell* (C. C. A. 3d, 1941), 120 F. 2d 90, 92-93, points 1, appears to be in accord with the present decision.

The District Courts have rendered decisions each way and the text writers are in hopeless conflict. The decisions on both sides of the question are collected in the accompanying brief, Point I, where reference is likewise made to the discussions of the text writers. Concerning the importance of this question, there can be no doubt. If the practice on motions to dismiss for insufficiency of statement has been so radically changed, and the courts are no longer confined to the allegations of the complaint itself (see *Gibbs* v. *Buck*, 307 U. S. 66, 76; *Polk Company* v. *Glover*, 305 U. S. 5, 9), it is of the utmost importance that the conflict among the Circuit Courts of Appeals and in the District Courts be resolved.

(b) Moreover, the Circuit Court of Appeals has decided on affidavits alone that the respondents' practice of exercising control over the location of dealers' used car salesroom was reasonable and that the refusal to permit petitioner to maintain a salesroom for used cars outside its Zone of Influence without respondents' consent was likewise reasonable. We urge that the question of reasonableness is one of fact, or at least a mixed question of fact and law. Strangely enough, there does not appear to be any direct ruling by this Court on this subject. However, this Court has held that in the determination of the reasonableness of a restraint, "each case demands a close scrutiny of its own facts." *Sugar Institute* v. *U. S.*, 297 U. S. 553, at 600.

The close scrutiny so required, we submit, is a factual one. Where the restriction is admitted and the control is

exercised in relation to property in which respondents have no direct interest, the question of reasonableness is one for the jury or other trier of the facts and should not be determined as a matter of law. Accordingly, we urge that the question of federal law so presented is of public importance and should be settled by this Court.

Questions Presented

1. In deciding a motion to dismiss a complaint for "failure to state a claim upon which relief can be granted" (Federal Rules of Civil Procedure Rule 12(b)(6)), may the Court consider facts not in the complaint, but presented by defendant's affidavit?

2. Does the complaint on its face state a cause of action for treble damages under the Anti-Trust Acts (15 U. S. C. A., Sec. 1 et seq.)?

3. If consideration of respondents' affidavit was permissible, did the Court err in determining that the restraint complained of was reasonable?

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, § 1 (43 Stat. 938); 28 U. S. C. A. Sec. 347.

Finality of Proceeding

The judgment in the case at bar is final. No leave to amend the complaint has been granted, with the result that the judgment operates as an adjudication upon the merits (Rules of Civil Procedure 41(b)).

WHEREFORE petitioner prays that a writ of certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the 2nd Circuit, commanding the said Court to certify and send to this Court for review and determination, as provided by law, this cause and a complete transcript of the record and of all proceedings had herein; and that the order of the United States Circuit Court of Appeals affirming the judgment in this cause may be reversed and that the petitioner may have such other and further relief in the premises as this Court may deem proper.

Dated November 24th, 1942.

BORO HALL CORP.

By ALFRED J. GIORDANO
President,
Petitioner.

ARTHUR GARFIELD HAYS,
Counsel for Petitioner.

State of New York,
County of New York, } ss.:

I hereby certify that I have examined the foregoing petition for a writ of certiorari and that in my opinion it is well founded and the cause is one in which the petition should be granted.

ARTHUR GARFIELD HAYS,
Counsel for Petitioners.

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Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Jurisdiction

The statement of jurisdiction is in the foregoing petition.

Statement of the Case

The facts have been set forth in the foregoing petition.

Summary of Argument

POINT I

THE COURT ERRED IN CONSIDERING THE AFFIDAVIT PRESENTED BY RESPONDENTS ON MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM.

POINT II

THE FACTS ALLEGED IN THE COMPLAINT STATE A CAUSE OF ACTION FOR DAMAGES UNDER THE ANTI-TRUST LAWS.

POINT III

EVEN IF THE AFFIDAVITS ARE ADMISSIBLE A GENUINE ISSUE ON A MATERIAL FACT IS PRESENTED.

POINT I

The Court erred in considering the affidavit presented by respondents on motion to dismiss the complaint for failure to state a claim.

The controversy concerning the "speaking motion to dismiss" has evoked voluminous arguments. It is not feasible within the limits of necessary brevity to enter into an extended discussion of the subject on this application. The decided cases and the texts are listed below.

We submit that a motion to dismiss for insufficiency under Rule 12(b) (6) should be treated the same as was a motion under Equity Rule 29 which was likewise a substitute for the practice on demurrer. In *Polk Company* v. *Glover,* 305 U. S. 5, this Court said at page 9:

> "Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction."

To the same effect is *Gibbs* v. *Buck* (1939), 307 U. S. 66, 76.

The nub of the controversy is well stated in a recent short but able article which appeared in *30 Southern California Law Review,* 92-96 (Availability of a "Speaking Motion" under Federal Rule 12(b) (6); November, 1941, Sparrowe). The writer said:

> "The majority view interprets Rule 12(b) (6) as excluding a consideration thereunder of facts outside the pleading. The adamant minority readily receives affidavits to support the motion. * * * The cases and writers seeking to permit affidavits have generally been silent as to the details of the procedure they sanction and the restrictions to be placed thereon. Rule 56 expressly negates a trial of fact under summary judgment procedure. Rule 12(b) does not contain this restriction, and a judge might permit a 'battle of affidavits'. To allow such a trial would be to deprive a litigant of the valuable rights of cross-examination of witnesses and of jury trial. Suppose also a defendant were to offer oral testimony in support of his motion. There is no rational basis in the minority view by which a distinction could be made to exclude such evidence. Under the majority rule none would be necessary.
>
> "Orderly conduct of trials and uniformity of procedure require that the rules adopted by the Supreme Court be applied as they were written. It is not enough to say that it is desirable to treat one motion as though it were another or that the availability of affidavits under one motion makes it 'quibbling' to deny their use elsewhere. Obviously an informed attorney will use Rule 56 when he finds it necessary to submit affidavits and so it is unfortunate that this needless controversy arose. It is essential, however, that affidavits be excluded when offered under Rule 12(b) (6). A Supreme Court decision or an amendment to the Rules will be required to obtain this result in all districts."

The authorities which hold that affidavits are not admissible and may not be considered on a motion to dismiss for failure to state a claim are:

> *Cohen* v. *U. S.* (C. C. A. 8th, Aug., 1942), 129 F. 2d 733, 735 et seq.;

Continental Collieries v. *Shober* (C. C. A. 3rd, Sept., 1942), 130 F. 2d 631, 635-636, points 16-17;

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plement 1942, page 25, reference to note 4, page 276; *Edmunds, Cyclopedia of Federal Procedure Forms,* Vol. 1, Supplement 1941, page 89, Rule 12(b); Ib. pages 102-103 (Collating and digesting cases); *Edmunds, Federal Rules of Civil Procedure* (1938), 527; *3 Ohlinger's Federal Practice* (1939), 169; Judge George Donworth, New York Symposium on Federal Rules (1938), *American Bar Association's Federal Rules of Civil Procedure, Proceedings of Institutes, Washington and New York,* 1938, page 302. See also *Polk Company* v. *Glover* (1938), 305 U. S. 5, 9, 59 S. Ct. 15, 83 L. Ed. 6, a per curiam, and *Gibbs* v. *Buck* (1939), 307 U. S. 66, 76, 83 L. Ed. 1111, 59 S. Ct. 725, on this point under the old equity rules; *Redlands Foothill Groves* v. *Jacobs* (D. C. S. D. Cal., 1940), 30 F. Supp. 995, 1007, footnote; *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.* (C. C. A. 7th, Dec., 1939), 108 F. 2d 433, 436, points 2 and 3.

The best statements of reasons are in *Kentucky-Tennessee Light & Power Co.* v. *Nashville Coal Co., supra* (D. C. Ky., March 13, 1941), 37 F. Supp. 728, 736-737, points 10-16; *Kuhn* v. *Pacific Mut. Life Ins. Co., supra* (D. C. S. D. N. Y., 1941), 37 F. Supp. 102, 104-105, points 1-3; *Eberle* v. *Sinclair Prairie Oil Co.* (D. C. Okla., 1940), 35 F. Supp. 296, 299-300, points 7-9, aff'd (C. C. A. 10th, 1940) 120 F. 2d 746; and the textbooks and law review articles herein cited, especially *Stanley E. Sparrowe, "Availability of A 'Speaking Motion' Under Federal Rule 12(b)(6)"* (November, 1941), 30 So. Cal. Law Review 92-96, quoted hereinabove.

Neutral but valuable discussions are *Pike & Fisher, The "Speaking Demurrer"* (1940), 3 Fed. Rules Serv., Commentary, 12 b. 33, page 674; *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.* (C. C. A. 7th, Dec. 11, 1939), 108 F. 2d 433, 436, points 2 and 3.

Expressing desire for your Honor's decision are Mr. George Roeming (9 George Washington Law Review 174, 4 Fed. Rules Serv., L. R. 40, page 976) and Judge Church Ford (1940) 1 F. R. D. 321.

The authorities which hold that affidavits may be considered are *Central Mexico Light & Power Co.* v. *Munch* (C. C. A. 2d, Dec. 1940), 116 F. 2d 85, 87, point 1; *Gallup* v. *Caldwell* (C. C. A. 3rd, 1941), 120 F. 2d 90, 92-93, point 1; *Ellis* v. *Stevens* (D. C. Mass., March 3, 1941), 37 F. Supp. 488, 490; *Palmer* v. *Palmer* (D. C. Conn., 1940), 31 F. Supp. 861, 863-864, points 1 and 2, and footnote 1; *U. S. Trust Co.* v. *Sears* (D. C. Conn., 1939), 29 F. Supp. 643, 645, point 2, footnote; *Alabama Independent Service Station Ass'n* v. *Shell Petroleum Co.* (D. C. Ala., 1939), 28 F. Supp. 386, 388-389, points 2; *Massaro* v. *Fisk Rubber Corp.* (D. C. Mass., January 10, 1941), 36 F. Supp. 382; *Calhoun* v. *Lange* (D. C. Md., 1941), 40 F. Supp. 264, 266, point 3; *1 Moore's Fed. Pract.*, pages 645-647, sec. 12.04, especially page 647, note 10, and 1941 Supplement pages 182-184, where authorities pro and con are collated; Dobie, *The Federal Rules of Civil Procedure* (1939), 25 Va. Law Review 261, 266; *Pike, Objections to Pleadings Under the New Federal Rules, etc.* (1937), 47 Yale L. J. 50, 1 Fed. Rules Serv., L. R. 6, page 765; *Roeming, Speaking Motions Under New Federal Rule 12(b)(6)* (1940), 9 George Washington Law Review 174, 4 Federal Rules Serv., L. R. 40, page 972; Judge Charles E. Clark, Washington Institute On Federal Rules (1938), *American Bar Association's Federal Rules of Civil Procedure, Proceedings of Institutes, Washington and New York,* 1938, pages 74-75.

POINT II

The facts alleged in the complaint state a cause of action for damages under the Anti-Trust Laws.

The divergence of opinion in the Circuit Court of Appeals arose on the question of reasonableness of the restraint.

The majority said (R. 143-144; 124 F. 2d 823):

> "We think the effect of the proof is that General Motors Sales Corporation required no more than that

> the location of a used car depot should be fixed by agreement at such a place as would not unduly prejudice other dealers who did business with the seller. We do not regard this as an unreasonable interference with competition or an unfair arrangement between the plaintiff and General Motors Sales Corporation. The latter had the right under its contract to discontinue dealings with the plaintiff on 30 days' notice. Under such circumstances we can see no reason why it should not be allowed to fix a location for the sale of used cars at a place that did not unduly affect other dealers."

Judge Frank, however, thought that this question should be determined at a trial (124 F. 2d 824; R. 145).

If the complaint be tested as a pleading, and if the allegations are, for the purpose of the motion, to be taken as true and the pleader given the benefit of the reasonable intendment inferrable from the allegations, there should be little doubt that a cause of action is alleged. The essential allegations show—

(1) Plaintiff was a dealer in new and *used* automobiles;

(2) Defendants were manufacturers and sellers of *new* automobiles;

(3) Plaintiff, under a contract with the defendants, was entitled to sell *new* automobiles manufactured by the defendants in an area which comprised the entire State of New York and a portion of the State of New Jersey;

(4) Defendants were financially interested in concerns which competed with the plaintiff in the sale of automobiles to the public;

(5) Defendants, who had no direct interest in the *used* automobiles which the plaintiff sold, threatened to cancel the contract for *new* automobiles, unless plaintiff refrained from opening a used car salesroom outside an arbitrary zone, narrower than its selling zone;

(6) This action was taken by the defendants for the purpose of preventing the plaintiff from competing with other automobile dealers, including those concerns in which the defendants had an interest;

(7) The effect of this restriction was to destroy the plaintiff's ability to sell used cars, which in turn prevented it from buying and selling new cars and thereby restrained trade.

It may be that upon a trial and after "close scrutiny" of the facts of this case (*Sugar Institute* v. *U. S.*, 297 U. S. 553, at 600), the jury or other trier of the facts will come to the conclusion that the practice of controlling the location from which used cars are to be sold was entirely reasonable, and that the control was reasonably exercised in the present case. The jury may, however, well conclude that the practice was wholly unreasonable, or if reasonable generally, was unreasonably exercised in the present case, if for no other reason than because respondents had a financial interest in other concerns which competed in the retail trade with petitioner.

The majority in the Circuit Court said that "Chase, the regional manager, was not shown to have made any unreasonable demands" (R. 144; 124 F. 2d 823). The very fact that the defendants, in the guise of regulating the sale of new automobiles, purported to go beyond the contract and sought to restrict the manner of selling used automobiles, is *prima facie* evidence of an undue restriction in trade.

This Court in *Ethyl Gasoline Corporation* v. *United States*, 309 U. S. 436 at 456 said:

> "He (the holder of a patent) may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices or processes or materials which lie outside of the monopoly of the patent licensed."

Certainly a seller of new automobiles has no greater right than the holder of a patent to tie to the sale of his new automobiles the sale of used automobiles in which he has no interest.

In *United States* v. *General Motors Corporation* (C. C. A. 7th, May 1, 1941), 121 F. 2d 376, 393, the Court sustained the verdict of the jury which had found the General Motors Corporation guilty of violation of the Anti-Trust laws because it required dealers to finance the sale of new cars through its financing subsidiary. The Court further held that the joint action of the parent and subsidiary constituted a combination within the meaning of the statute. The restraint herein effected on the sale of used cars is, we submit, more unreasonable than that which was held illegal in *United States* v. *General Motors Corporation.*

Since there is a restraint, presumptively unreasonable, the only other question is its effect on interstate commerce. From the allegation that the petitioner was authorized to sell new cars both in New York and in New Jersey, it is not an unreasonable inference that a restriction upon its activities would affect commerce between the States.

Perhaps the allegations concerning interstate commerce should have been more clearly stated in the complaint. Nevertheless, they are sufficient to give notice of the claim. An error of this character should not be fatal and should at most result in a requirement that the complaint be amended by amplifying these allegations or by making them more definite and certain.

POINT III

Even if the affidavits are admissible a genuine issue on a material fact is presented.

We have been able to find no case in this Court which bears directly on the question whether the reasonableness of the restraint is a question of fact, or may be decided solely as a question of law. As we have said above, the language of this Court in *Sugar Institute* v. *United States*, 297 U. S. 553, 600, would seem to indicate that the question is one of fact or at least one of mixed law and fact.

In *U. S.* v. *Whiting* (D. C. Mass., 1914), 212 Fed. 466, 474, point 4), the Court held that the reasonableness of a restraint was a question to be determined by a jury. The language of the Court in *U. S.* v. *General Motors Corp.*, 121 F. (2d) 376, 399, would indicate the same rule.

See also *Continental Candy Corp.* v. *California etc. Refining Co.*, 270 Fed. 302, 305, point 2 et seq., affirmed in *Fosburgh* v. *California etc. Refining Co.* (C. C. A. 9th, 1923), 291 Fed. 29, 32-37; *Weathers* v. *Jarvis* (1936), 294 Mass. 227, 228-229, 200 N. E. 886, 887; *Berg* v. *Plitt* (1940), 178 Md. 155, 166, 12 Atl. 2d 609; *Kiser Co.* v. *Padrick* (1923), 30 Ga. App. 642, 649, 118 S. E. 791.

There are in the case at bar a number of factual elements which must enter into the reasonableness of the restraint. Apart from the attempt of the respondents to tie used car dealings to dealings in new cars, the financial interest which the respondents are alleged to have in dealer concerns which competed with the petitioner in the New York Zone cannot be lightly overlooked. The respondents, in their letters submitted with the affidavit, expressed the necessity of preventing "undue prejudice" to other dealers. That in itself presents a controversial issue of fact. There is the question whether respondents acted reasonably in arrogating to themselves the right to be the

final judges to determine whether the maintenance of a *used* car outlet by the petitioner at a given location would "unduly" prejudice another dealer. We respectfully submit that questions of this character can be resolved only at a trial with a full opportunity of cross examination and with a complete development of all the material facts.

Conclusion

We respectfully pray that the petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

Rule 12(b) (6)

Federal Rules of Civil Procedure, Rule 12(b), 28 U. S. C. A., following Section 723(c), so far as immediately material, reads as follows:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted. * * *"

Statute Authorizing Action

"Sec. 15. Suits by persons injured; amount of recovery. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * *, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (15 U. S. C. A. §15, Oct. 15, 1914, c. 323, §4, 38 Stat. 731.)

Statutory Definitions of Terms

"Sec. 7. 'Person' defined. The word 'person,' or 'persons,' wherever used in section 1, 2, 3, or 15 of this chapter shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, * * * the laws of any State, or * * *" (15 U. S. C. A. §7, July 2, 1890, c. 647, §8, 26 Stat. 210).

"Sec. 12. Words defined. 'Antitrust laws,' as used in sections 12 to 27, inclusive, of this chapter, includes sections 1 to 27, inclusive, of this chapter.

" 'Commerce,' as used in sections 12 to 27, inclusive, of this chapter, means trade or commerce among the several States * * *.

"The word 'person' or 'persons' wherever used in sections 12 to 27, inclusive, of this chapter shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, * * * the laws of any State, or * * *" (15 U. S. C. A. §12, Oct. 15, 1914, c. 323, §1, 38 Stat. 730).

Anti-Trust Statute

"Sec. 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, * * * is hereby declared to be illegal; * * *" (15 U. S. C. A. §1, July 2, 1890, c. 647, §1, 26 Stat. 209, as amended Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693).

DEC 23 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 544.

BORO HALL CORP.,
Plaintiff-Petitioner,

—against—

GENERAL MOTORS CORPORATION, GENERAL MOTORS SALES CORPORATION, WILLIAM E. HOLLER, ALFRED P. SLOAN, JR., WILLIAM S. KNUDSEN, DONALDSON BROWN and JOHN THOMAS SMITH,
Defendants-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

ALBERT M. LEVERT,
Counsel for Respondent John Thomas Smith;

JOHN THOMAS SMITH,
Counsel for Respondents General Motors Corporation, et al.

ALBERT M. LEVERT,
GORDON H. BROWN,
Of Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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IN THE

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Statement.

The petition egregiously seeks support in a couple of improvisations.

First, the decision of the Second Circuit Court of Appeals herein is not in conflict with any reported decision of any other Circuit Court of Appeals on the same matter, namely, the dismissal of a complaint upon a motion accompanied by affidavits, either under Rules 12 (b) (6), or 56, of the Rules of Civil Procedure. (The petition erroneously states that this question is presented only under Rule 12 (b) (6)—petition, pp. 1, 2, 8). There

is, indeed, as we shall show, in respect of both rules harmony and uniformity of decisions on this matter in all Courts of Appeals where the question arose for decision.

Secondly, the petition presents only a pseudo background of the case. This is achieved by a piece-meal lifting of some elements of the case out of their framework, accompanied by silence as to the whole context. A true picture of the case first requires a rectified statement of the critical facts which underlie the dismissal of the complaint, without leave to amend, by the District Court, the subsequent affirmance in the Court of Appeals, and the later denial of a petition for rehearing (upon affidavits which constitute substantially the entire Volume II of the transcript of record), by a unanimous court.[1] This petition for rehearing by the plaintiff brought about a unanimous decision in which Judge Frank reversed his position and joined with the majority in holding that the original decision had been correct (R. p. 301). The case now before this court, therefore, is an affirmance by the whole Court below—and not by a divided Court as the petition and brief, pp. 4, 18-19, would imply. This result was reached by the following procedural steps:

On behalf of the defendants a motion was made "for an order dismissing the action herein". As it is recited in the order itself, the motion concluded (R. p. 130): "and asking for such other and further relief as to this Court might seem just and proper". It was stated that such motion was made "upon the complaint" and "upon the affidavit and exhibits thereto", which was identified in the notice of motion (R. p. 16). This is in accord with Rule 7 (b) which defines a motion as "an application

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[1] The District Court's opinion (Southern District of New York), R. pp. 124-129, is reported 37 Fed. Supp. 999. The opinions of the Circuit Court of Appeals, 2d Circuit: (a) upon affirmance, R. pp. 142-6, is reported 124 Fed. 2d 822; (b) upon denial of the petition for rehearing, R. pp. 301-303, is reported 130 Fed. 2d 196.

to the court for an order". The Court will also notice that no mention is made in the notice of motion either of Rule 12 (b) (6) or of Rule 56, but the grounds were stated to be that, viz., "the complaint fails to state a claim, in law or fact, upon which relief can be granted". The identified affidavit stated among other things that it (R. p. 23):

> "* * * set forth the entire relations of the defendants herein with the Boro Hall Chevrolet, Inc., in respect of the matters referred to in the complaint in this action * * *".

(The material parts of the affidavit and correspondence are at R. pp. 17-119).

The plaintiff filed an affidavit in opposition (pp. 120-122), (about which the petition is also silent). Moreover, as the Court of Appeals points out (R. p. 143):

> "In the papers submitted for the plaintiff it is said that its president Giordano did not deny or contradict the statements contained in the affidavit submitted on behalf of the defendants, nor impugn the authenticity or contents of any of the letters and documents annexed thereto, except as set forth in his affidavit, which, however, contained no denial of any material matter". (See also R. p. 123).

The facts before the Court were, therefore, undisputed and uncontradicted. And the decisions below were based on the complaint and the conceded facts. The function and relation of the factual elements to each other are stated with fullness in the opinions of the District Court Judge and the Court of Appeals (R. pp. 124-129, 142-6); we adopt the recitations of the facts as our rectified statement of facts and, in the interest of brevity, respectfully invite this Court's attention thereto.

Since the petition carries the implication at pp. 5-6 that sales of new or used cars by the plaintiff were limited to its assigned Zone of Influence, and that the plaintiff was prohibited from opening used car outlets outside the said Zone of Influence, we may point out that this is not correct. As the opinion points out (R. p. 143):

> "* * * the uncontradicted affidavit filed on behalf of the defendants negatives the claim that used cars could only be sold by the plaintiff within the 'Zone of Influence' ",

and again that

> "* * * the effect of the proof is that General Motors Sales Corporation required no more than that the location of a used car depot should be fixed by agreement at such a place as would not unduly prejudice other dealers who did business with the seller."

This both Courts found reasonable. Indeed, the plaintiff himself strenuously objected that any other Chevrolet dealer should have any authorized places of business, with the Chevrolet name, within his assigned Zone of Influence. Plaintiff had even complained of dealers who had places of business "a block or so from the edge of my territory", and that this would "crowd" its territory; plaintiff further wanted that "all dealerships" should be located "near the center of their own zones of influence", and that no "branch office" should be permitted in a dealer's own territory (R. pp. 91-94; cf. R. pp. 167A, B). On this point the District Court found (R. p. 128):

> "* * * I can find nothing unreasonable in the effort of the defendants to prevent the plaintiff from trading upon defendants' name in areas in which the name had been delegated to others". (See also R. p. 144).

Judge Frank in his original dissenting opinion in respect of this conclusion had said (R. p. 145):

> "On the other hand, a restriction of the place of sale of unused cars so as not to unduly prejudice other dealers might be reasonable",

but thought that "the record facts are not sufficient to show that such is the case here". To which he added that the defendants

> "* * * at a trial, or by a motion accompanied by affidavits setting forth the facts more in detail can raise the issue as to the reasonableness of their proposed restriction on the place of sale of used cars".

The plaintiff took his cue from this statement and made an anomalous petition for a rehearing. The defendants were ordered to reply thereto. In reply, the facts which Judge Frank thought ought to be shown were produced from the plaintiff's own record of sales. These statistical facts appear at Record, pp. 154-7, and 157 A, B, C, D. The reasonableness of the restriction was completely demonstrated. It showed not only that the plaintiff was not restricted in sales of new or used cars to his Zone of Influence, but also that other Chevrolet dealers sold more new and used cars in plaintiff's Zone of Influence where they had no outlets. It further proved that the plaintiff sold more new and used cars outside of its Zone of Influence, where it had no establishment, than within it where it had three establishments. This belied the argumentative claim which had been made below, and repeated in the petition for rehearing, that (R. p. 151):

> "The location of our new car salesroom in our zone of influence did not affect our new car sales but that the confining of used car outlets therein had such harmful effects on our business."

The figures from plaintiff's own books showed (R. p. 157 A, B, C, D):

	Sales by Plaintiff Boro Hall Chevrolet, Inc. in Its Own Zone of Influence (3 Outlets)		Sales by About 23 Other Chevrolet Dealers Into Plaintiff's Zone of Influence (No Outlets)		Sales by Plaintiff Boro Hall Chevrolet, Inc. Outside Its Own Zone of Influence Into Other Chevrolet Dealers' Zones (No Outlets)	
Year	New Cars	Used Cars	New Cars	Used Cars	New Cars	Used Cars
1938	70	114	176	205	168	174
1939	46	108	100	151	173	189
Total	116	222	276	356	341	363

For these two years plaintiff sold outside its zone of influence to residents outside its own zone (where it had no establishments) 160 more new Chevrolet cars than it sold in its own territory (where it had three establishments), and 134 more used cars than it sold in its own territory. On the other hand, other authorized Chevrolet dealers in Kings and Queens Counties, without any new or used car outlets therein, sold to residents within plaintiff's territory from their establishments in outlying districts 341 new Chevrolet cars, or 235 more than plaintiff itself sold; and, 363 used cars, or 141 more than plaintiff itself sold there with its three establishments. These figures established the correctness of the conclusion of the majority of the judges of the second circuit, with an approximation to mathematical certainty, that (R. p. 144):

> "There was no proof that the General Motors Sales Corporation required a location for the sale of used cars that was unfair to the plaintiff • • •.
>
> • • • • • • • •
>
> "We regard the record as showing no such burden and hold that leave to amend was properly denied."

And further that:

> "The record establishes that the plaintiff was not restricted to sales within its 'Zone of Influence', that it had only a non-exclusive sales contract * * *".

On this basis, upon rehearing, Judge Frank concurred in the opinion which denied the petition; and, in effect, he revoked his previous dissent: he agreed that the original decision had been correct. Said the now unanimous Court (R. p. 301):

> "Taking the plaintiff's affidavits on its motion at their face value, there can be no doubt that there was ample competition in the low-price car field in Brooklyn. * * * The proof shows that if plaintiff could have selected a site for a used car outlet where any gain on its part would not have represented another dealer's loss the selection would have been acquiesced in".

Argument.

(i) The decision of the C. C. A. 2d that it was proper to consider affidavits in connection with the motion to dismiss the action is not in conflict with the decision of any other Circuit Court of Appeals.

(ii) The questions presented were questions of fact peculiar to the case, are not of general importance and are not worthy of review by this Court.

We shall pass immediately to (i) of the above argument because, in our submission, the correctness of (ii) was demonstrated in the course of our statement.

Indeed, the authorities go far beyond the requirements of the present case. In the instant case not only does the complaint fail to state a cause of action (R. pp. 126; 129); the undisputed relevant affidavit facts also show

that the facts arising out of the relation of the plaintiff and defendants to each other in respect of the claim made in the complaint could not, in any event and in any view, give rise to any cause of action under the anti-trust laws.

With unanimity, Circuit Courts of Appeals have held that it was proper to consider affidavits in connection with a motion to dismiss, either under Rule 12 (b) 6 in connection with Rule 43 (e),[2] or under the Summary Judgment Rule 56,[2]—whenever and wherever the question was presented. There are no decisions to the contrary. In addition to the two decisions in the instant case, there are three other cases to the same effect in the 2d Circuit; two cases in the 3rd Circuit; two cases in the 5th Circuit; and one case each in the 6th and 7th Circuits, as follows:

Second Circuit.

(Dec. 6, 1940—*Central Mexico Light & Power Co.* v. *Munch*, 2 Cir., 116 Fed. 2d 85, 87.

The Court said, p. 87:

> "It is not important whether the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought, the difference in name is unimportant. In any event, the affidavits presented are available on either motion".

(Feb. 26, 1942)—*Cohen, et al.* v. *American Window Glass Co.*, 2d Cir., 126 Fed. 2d 111, 114 (to the same effect on all points as the first cited case).

(July 6, 1942—*Samara* v. *United States*, 2d Cir., 129 Fed. 2d, 594, 597 (to the same effect as the two first cited cases).

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[2] Printed in Appendix.

Third Circuit.

(May 21, 1941)—*Gallup* v. *Caldwell*, 3d Cir., 120 Fed. 2d 90, 92-93.

(April 9, 1942)—*Victory* v. *Manning*, 3d Cir., 128 Fed. 2d 415, 416.

Fifth Circuit.

(May 15, 1941)—*Board of Public Instruction for County of Hernando, State of Florida* v. *Meredith et al.*, 5th Cir., 119 Fed. 2d 712, 713; certiorari denied October 13, 1942, U. S. Sup. Ct. 86 L. ed. 82.

This was a motion for summary judgment on the pleadings, the request for admission and supporting affidavits under Rule 56. The Court said at p. 713;

> "It was entirely in keeping with the letter and spirit of Rule 56 that this could be done by ex parte affidavits which were not offset by opposing affidavits."

The court cited a previous case in the same circuit to the same effect, to wit:

(June 23, 1939)—*Port of Palm Beach Dist.* v. *Goethals*, 5th Cir., 104 Fed. 2d 706, 708.

Sixth Circuit.

(June 6, 1942)—*Lucking et al.* v. *Delano, etc.*, 6th Cir., 129 Fed. 2d 283, 285.

Seventh Circuit.

(Dec. 22, 1941)—*Weeks, et al.* v. *Barcco Oil Co., et al.*, 125 Fed. 2d 84, 93.

It is a little startling to find that the petition omits to mention these cases from other Courts of Appeals in

its assertion of a conflict of decisions. Again, we are obliged, not without wonder, to point out that in the petition at pp. 9 and 16 the case of *Continental Collieries* v. *Shober*, 3d Cir., 130 Fed. 2nd 631, is cited not only in support of this claim but even as being in opposition to the case of *Gallup* v. *Caldwell*, a case in the same circuit. In the case of *Continental Collieries* v. *Shober* the motion was to dismiss the complaint for insufficiency on its face, and without more. No affidavit in support of the motion was involved. In *Victory* v. *Manning*, above cited, and not referred to in the petition—the only case besides *Gallup* v. *Caldwell*—where the point was directly in issue in the 3rd Circuit, that Court said at 128 Fed. 2d p. 416:

> "This Court recently had occasion to examine the problem of whether speaking motions are permitted under the new Rules and concluded that they are. *Gallup* v. *Caldwell*, 3 Cir., 1941, 120 F. 2d 90".

The case of *Cohen* v. *United States*, 8th Cir., 129 F. 2d 733, another Circuit Court of Appeals case through which the petition (pp. 8, 15) seeks support was again a mere motion to dismiss the complaint, upon its face, and without more. No affidavit was involved. (See 129 Fed. 2d at p. 736).

In the impermeable forest zone of undigested District Court cases in the petition, at p. 18, there is a reference to a 7th Circuit case, namely, *Gatch Wire Goods Co.* v. *W. A. Laidlaw Wire Co.*, 108 Fed. 2d 433 (1939). This case not only does not involve the point but, in so far as its dicta went, it is wholly in accord with the authorities given by us. The question was: should the Court take judicial notice "of the contents of a file wrapper", on a motion to dismiss a patent suit. The Court went on to say that a motion for judgment under Rule 56 would lie (108 Fed. 2d at p. 436):

> "Such motions for judgment may be heard on affidavits. Such a practice lessens the need of motions

to dismiss although it probably does not eliminate the practice."

Nearly two years later, the same Circuit Court of Appeals decided the case of *Weeks et al.* v. *Barco Oil Co., et al.*, 125 Fed. 2d 84 (1941), which we mention above. The point was directly involved on a motion to dismiss the action, upon affidavits. That Court said (at p. 93):

> "We think this form of proof was proper on this motion to dismiss, Rule 43 (e); *Central Mexico Light Co.* v. *Munch*, 2 Cir., 116 F. 2d 85; *Railway Express Agency, Inc.* v. *Jones*, 7 Cir., 106 F. 2d 341; *Pelelas* v. *Caterpillar Tractor Co.*, 7 Cir., 113 F. 2d 629; *Gallup* v. *Caldwell*, 3 Cir., 120 F. 2d 90, decided May 21, 1941. These affidavits were before the court and were properly considered. Their contents were not challenged by counter affidavits or other proof".

Although the District Court cases at petition p. 16 are immaterial, indeed wholly tangential to the issue here and now, we may point out that of a total of 19 unanalyzed cases, 8 are from New York and, (even assuming the point was involved and that the situations therein were not easily distinguishable), are overruled by the C. C. A. 2d decisions; one case each from Pennsylvania and New Jersey are overruled by the C. C. A. 3d decisions; two cases from Georgia, overruled by the C. C. A. 5th decisions; one case each from Kentucky and Ohio, overruled by the C. C. A. 6th decision; one Illinois case, overruled by the C. C. A. 7th decision—a total of 15 of the 19 cases overruled. In the Oklahoma D. C. case of *Baker* v. *Sisk*, 1 F. R. D. 232: a summary judgment upon affidavits was granted, and a motion voluntarily to dismiss by the plaintiff denied; in the other Oklahoma case, *Eberle* v. *Sinclair Prairie Oil Co.*, 35 Fed. Supp. 296, 298: a motion for summary judgment was granted upon affidavits, affirmed at 120 Fed. 2d 746 (10th Cir.), where the

question did not even arise; in the California D. C. case of *Dirk Ter Haar* v. *Seaboard Oil Co. of Delaware, et al.*, 1 F. R. D. 598; it does not appear that any affidavit facts were involved. The same Judge who decided the *McConville* v. *District of Columbia* (D. C. Dist. Col.) 26 Fed. Supp. 295, later in the case of *American-Mexican Claims Bureau Inc.* v. *Morgenthau*, 26 Fed. Supp. 904, 905, granted a motion to dismiss an action, upon affidavits. Against this there are so many District Court cases wholly in accord with the present decisions that it would be boresome to list them. On this showing, a conflict even of District Courts can not now be plausibly asserted.

Equity Rule 29 is not of the slightest relevancy on the question of the meaning of Rule 12 (b) (6) for the text of the latter is altogether different. Judge Clark, now of the C. C. A. 2d, and one of the draftsmen of the rule, has repeatedly pointed this out. ("Proceedings", Session of Washington, D. C. Institute on Federal Rules, pp. 74-5). These differences are clearly stated in the case of *Alabama Independent Service Station Ass'n., Inc.* v. *Shell Petroleum Corp.*, (D. C., N. D. Alabama), 28 Fed. Supp. 386, 388-9, in which the Court said:

> "This rule (speaking of Rule 12 (b) (6)) differs significantly from the former Equity Rule 29, 28 U. S. C. A. following Section 723, in that the latter provided only for 'every defense in point of law arising upon the face of the bill' by motion. We are of the opinion that the affidavits, depositions and answers to interrogatories may be considered here on all of the motions, the latter being within the terms of Rule 12 (b) defenses in law and fact."

CONCLUSION.

In view of the foregoing deliberations, the decisions of the C. C. A. 2d and of the District Court are correct, and the petition should be denied.

Respectfully submitted,

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Dated, New York, N. Y., Dec. 23, 1942.

Appendix.

Rule 43 (e)

Federal Rules of Civil Procedure, Rule 43 (e), 28 U. S. C. A., following Section 723 (c), so far as material, reads as follows:

> "Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, * * *".

Rule 56 (b) (e)

In so far as material, Rule 56 (b) (e) read as follows:

> "Summary Judgment. * * *
>
> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.
>
> * * * * * * * * *
>
> (e) Form of Affidavits; Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."